United Nations AT/DEC/1105

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1105

Case No. 1208: KINGHAM Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas, on 10 July 2001, Roshan Kingham, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF) filed an Application, requesting the Tribunal, inter alia:

> 7. ...
>
> ...
>
> (c) *to decide* to hold oral proceedings ...;
>
> 8. On the merits ...
>
> (a) *to find and rule* that the Joint Appeals Board [(JAB)] erred ... in failing to provide appropriate and adequate compensation ... for violation of her rights ...
>
> (b) *to award* the Applicant appropriate and adequate compensation ... for the actual, consequential and moral damages ...
>
> (c) *to award* the Applicant additional compensation for the delays in her case;
>
> (d) *to order* that the Applicant's post be assured of proper classification and that she be afforded every reasonable consideration for promotion to the G-5 level at the earliest opportunity ...;

(e) *to fix* ... the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *to award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 October 2001 and periodically thereafter until 28 June 2002;

Whereas the Respondent filed his Answer on 24 June 2002;

Whereas the Applicant filed Written Observations on 16 August 2002;

Whereas, on 22 October 2002, the Respondent submitted comments on the Applicant's Written Observations and, on 4 December 2002, the Applicant commented thereon;

Whereas, on 14 July 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on a six months and 24 days fixed-term appointment as Clerk-Typist at the G-2 level, on 7 May 1980. Her fixed-term appointment was extended several times and, effective 1 December 1982, she was granted a permanent appointment. The Applicant transferred to the Internal Audit Service (now Office of Internal Audit (OIA)) on 26 May 1987 and, effective 27 June 1991, was promoted to the G-4 level with a title of Audit Clerk.

On 19 January 1996, the Applicant was advised that, effective close of business 31 July, her post would be abolished. She was further informed that her name would be placed on a roster for suitable posts; however, if she were not placed on another post prior to the end of the notice period, her services with UNICEF would be terminated. On 12 February 1996, the Applicant requested review of this decision.

On 10 June 1996, the Applicant wrote to the JAB, requesting suspension of action and contesting the decision to abolish her post. The JAB held a hearing on the suspension request on 17 June, during which the Respondent gave assurances that the Applicant would be placed against another post, prior to the effective date of the abolition of her post, maintaining her personal level and grade. Consequently,

the JAB did not make any recommendation. On 19 June the Respondent wrote to the JAB, confirming the above assurances.

On 18 July 1996, the Applicant was informed that, effective 1 August, she would be transferred to the G-3 level project post of Help Desk Clerk in the Office of Administrative Management, while retaining her G-4 personal level and permanent status. On 29 July, the Applicant accepted this position, while seeking written assurance that the placement process would continue and requesting that she be placed in a core post before the end of 1997, in accordance with the remarks made by the Respondent at the JAB hearing. On 7 August, the Respondent replied that UNICEF had, in fact, kept its commitment and that they could not guarantee that the Applicant would be placed in a core post by the end of 1997. Further correspondence on the issue ensued.

The Applicant was subsequently assigned to several other posts, all on a temporary basis, maintaining her personal grade and contractual status.

On 28 January 1999, the Applicant requested the Executive Director, UNICEF, to review the failure by UNICEF to fully implement its commitment to place her in an appropriate post, commensurate with her personal level. On 25 February, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, replied, referring the Applicant to the 7 August 1996 letter. While informing the Applicant that the budget designation of the post she occupied was changed from a project to an established post, in a good faith effort to reach an agreeable solution she presented the Applicant with two options: (a) to resume her officially assigned functions as Help Desk Clerk, or (b) to transfer, along with her established post, to "633 Third Avenue". A job description would be prepared and submitted for classification, to be proposed at the G-4 level. On 5 March, the Applicant expressed her reservations regarding these options.

On 25 March 1999, the Applicant lodged an appeal with the JAB.

On 12 April 1999, the Applicant assumed the Help Desk duties as mentioned in option (b) above; on 13 April she advised the Officer in Charge, DHR, that she considered that arrangement an "ad hoc" one and, on 4 May, she informed him that she wished to proceed with her appeal.

The JAB adopted its report on 24 April 2001. Its considerations and recommendation read, in part, as follows:

"*Considerations*

17. ...

The Panel concluded ... that the appeal was receivable.

18. ... The Panel concluded that [the] Respondent did eventually fully implement its commitment ...

19. The Panel wishes, however, to underline the word "eventually" in the preceding paragraph. It was not until ... 33 months after the hearing that [the] Appellant was confirmed in a G-4 post. Moreover, at every step along the way ... [the] Respondent failed to take positive action unless and until prodded by [the] Appellant's appeals and complaints.

20. In addition, the Panel found reason to believe that, until its eventual placement action, [the] Respondent had 'been negligent as an employer in failing to extend to the [Appellant] fair and just treatment ...'.

...

Recommendation

22. The Panel recommends that the Secretary-General authorize payment of three months net base salary to Appellant to compensate for the injury suffered.

..."

On 10 July 2001, the Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 16 July 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General accepted the conclusions of the JAB and, in accordance with its unanimous recommendation, had decided to compensate her in the amount of three months net base salary.

Whereas the Applicant's principal contentions are:

1. Although the JAB recognized that the Applicant's rights were violated, she was awarded only token compensation, which is not commensurate with the harm done to her well-being and her career.

2. The JAB failed to take sufficiently into account the long delays in adjudicating the case.

3. The abolition of the Applicant's post was a reflection of bias against her; she was targeted for separation and suffered discrimination for being an outspoken staff representative.

4. The Respondent failed to apply the established policies with regard to placement of staff in abolished posts.

Whereas the Respondent's principal contentions are:

1. The Applicant has been adequately and sufficiently compensated for the irregularities in her case.

2. The Applicant failed to produce evidence of a pattern of bias.

3. The Administration has not failed, other than in instances determined by the JAB and accepted by the Respondent, to apply established policies with regard to the placement of staff in abolished posts.

4. The Applicant is not entitled to be awarded the payment of compensation as a result of "administrative delays".

The Tribunal, having deliberated from 1 to 21 July 2003, now pronounces the following Judgement:

I. The Applicant joined UNICEF on 7 May 1980 on a fixed-term appointment as Clerk-Typist at the G-2 level. Her contract was extended and, effective 1 December 1982, she was granted a permanent appointment. On 24 June 1991 she was promoted to the G-4 level as Audit Clerk.

II. On 19 January 1996, the Applicant was notified that her post had been abolished. She was given a six-month notice period, during which efforts would be made to place her on another post, but, she was further informed that, should these efforts prove not successful, her employment would be terminated. The Applicant appealed this decision to the JAB and requested, as an interim measure, that action on the decision be suspended. The JAB held a hearing on the case, during which the Administration gave assurances that another suitable job would be found for the Applicant within the six-month period and that every effort would be made to identify an appropriate post for the Applicant, one which would retain her personal

level and grade. On the basis of those assurances, the JAB made no recommendation.

III. On 18 July 1996, the Applicant was informed that a post had been found for her and that as of 1 August she would be transferred to a G-3 post, while maintaining her G-4 personal level as well as her permanent status. An exchange of letters between the Applicant and the Administration ensued and, by letter dated 7 August, the Administration made clear to the Applicant that, in posting her as stated above, UNICEF had met its commitment as declared before the JAB.

The Applicant was subsequently assigned to various temporary posts, during which time she applied, unsuccessfully, to several posts at the G-4 and G-5 level.

IV. On 28 January 1999, the Applicant wrote to the Executive Director, UNICEF, requesting that she review UNICEF's failure to fully implement its commitment to place her in an appropriate post. The Administration, though claiming that the Applicant's request was time barred, nevertheless offered the Applicant, "in a good faith effort to reach a mutually agreeable solution", two options for her continued employment. The Applicant, having expressed her reservations regarding both options, nevertheless decided to accept one of them. Accordingly, on 1 April 1999, she assumed the duties of the Help Desk post at 633 Third Avenue. This post was to be submitted for classification with the expectation that it would be classified at the G-4 level.

Regardless of the above, the Applicant decided to proceed with an appeal to the JAB. On 24 April 2001 the JAB issued its report, concluding that the appeal was receivable and rejecting the Respondent's argument that it was time barred. On the merits, the JAB determined that, with the new core post offered to the Applicant, the Administration did eventually keep its commitment as made during the hearing on the request for suspension of action. At the same time, the JAB recommended that the Applicant be compensated for the injury she had suffered. The JAB considered that, the fact that UNICEF needed 33 months to honour its commitment, as well as the fact that at every step of the way the Applicant had to appeal and complain in order for the Respondent to take any action, warranted the Applicant being compensated in the amount equivalent to three months net base salary. This recommendation was subsequently accepted by UNICEF.

V. The Tribunal concurs with the JAB's conclusions and recommendation. Indeed, even though the Administration took its time in reaching a conclusive solution of the Applicant's employment problem, it did eventually resolve it. The Applicant was offered a suitable post, at her personal (G-4) level, which post was similar to the initial one that she had held. Although she initially expressed some reservations, the Applicant accepted this post. Moreover, throughout the period, from the abolition of her post to her assignment to the new post, the Applicant was kept in office and never lost her G-4 level or permanent status. Thus, the Applicant did not suffer any financial loss during this time. The Tribunal, however, does recognize that the Applicant had to struggle over an extended period of time to make the Administration meet its commitment and to find her a truly suitable post. This resulted in injury to the Applicant, for which she should be compensated. Having said this, it is the Tribunal's opinion that, the compensation, as recommended by the JAB and accepted by the Respondent, adequately compensated the Applicant for her injuries.

VI. For the foregoing reasons, the Application is rejected in its entirety.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Brigitte **Stern**
Member

Geneva, 21 July 2003

Maritza **Struyvenberg**
Executive Secretary

KINGHAM